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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
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10 NICOLE ANNA STEWART,

11 Petitioner,

12 v.

13 WARDEN,

14 Respondent.
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No. CV 14-326 DOC (FFM)

ORDER RE SUMMARY
DISMISSAL OF ACTION WITHOUT
PREJUDICE

16 On January 14, 2014, petitioner filed a Petition for Writ of Habeas Corpus
17 by a Person in State Custody (“Petition”). The Petition does not raise any
18 particular federal ground for challenging petitioner’s conviction, but states that
19 petitioner did not understand the charges or crime.

20 As a matter of comity, a federal court will not entertain a habeas corpus
21 petition unless the petitioner has exhausted the available state judicial remedies on
22 every ground presented in the petition. *Rose v. Lundy*, 455 U.S. 509, 518-22, 102
23 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). The habeas statute now explicitly provides
24 that a habeas petition brought by a person in state custody “shall not be granted
25 unless it appears that -- (A) the applicant has exhausted the remedies available in
26 the courts of the State; or (B)(i) there is an absence of available State corrective
27 process; or (ii) circumstances exist that render such process ineffective
28 to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1). Moreover, if the

1 exhaustion requirement is to be waived, it must be waived expressly by the State,
2 through counsel. *See* 28 U.S.C. § 2254(b)(3).

3 Exhaustion requires that the prisoner's contentions be fairly presented to the
4 state courts, and be disposed of on the merits by the highest court of the state.
5 *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). A claim has not been fairly
6 presented unless the prisoner has described in the state court proceedings both the
7 operative facts and the federal legal theory on which his claim is based. *See*
8 *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865
9 (1995); *Picard v. Connor*, 404 U.S. 270, 275-78, 92 S. Ct. 509, 30 L. Ed. 2d 438
10 (1971); *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996). A federal court may
11 raise the failure to exhaust issues *sua sponte* and may summarily dismiss on that
12 ground. *See Stone v. San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992);
13 *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (*per curiam*); *see also*
14 *Granberry v. Greer*, 481 U.S. 129, 134-35, 107 S. Ct. 1671, 95 L. Ed. 2d 119
15 (1987).

16 Petitioner has the burden of demonstrating that she has exhausted available
17 state remedies. *See, e.g., Brown v. Cuyler*, 669 F.2d 155, 158 (3rd Cir. 1982).
18 Here, it plainly appears from the face of the Petition that petitioner cannot meet
19 this burden with respect to her claim. Petitioner alleges that she has not filed any
20 appeal of her conviction or habeas petition in state court with respect to her claim.
21 (Petition at ¶ 3.)

22 Because petitioner has not raised her present claim with the California
23 Supreme Court, the Petition is unexhausted.

24 If it were clear that petitioner is raising a federal claim and that the
25 California Supreme Court would hold that petitioner's unexhausted federal claim
26 was procedurally barred under state law, then the exhaustion requirement would
27 be satisfied. In that event, although the exhaustion impediment to consideration of
28 petitioner's claim on the merits would be removed, federal habeas review of the

claim would still be barred unless petitioner could demonstrate “cause” for the default and “actual prejudice” as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims would result in a “fundamental miscarriage of justice.” *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). However, it is not “clear” here that petitioner is raising a federal claim or that the California Supreme Court will hold that petitioner’s federal claim is procedurally barred under state law. *See, e.g., In re Harris*, 5 Cal. 4th 813, 825 (1993) (granting habeas relief where petitioner claimed sentencing error, even though the alleged sentencing error could have been raised on direct appeal); *People v. Sorensen*, 111 Cal. App. 2d 404, 405 (1952) (noting that claims that fundamental constitutional rights have been violated may be raised by state habeas petition).

The Court therefore concludes that this is not an appropriate case for invocation of either exception to the exhaustion requirement regarding the existence of an effective state corrective process.

Therefore, the Petition is subject to dismissal.

IT IS THEREFORE ORDERED that this action be summarily dismissed without prejudice, pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.

LET JUDGEMENT BE ENTERED ACCORDINGLY.

Dated: January 30, 2014



 DAVID O. CARTER
 United States District Judge

Presented by:

/S/ FREDERICK F. MUMM
 FREDERICK F. MUMM
 United States Magistrate Judge